

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)	
)	NOS. CR-04-0139-LRS
Respondent,)	CV-06-0253-LRS
)	
-vs-)	
)	ORDER DENYING 28 U.S.C. §2255
CELERINO SANCHEZ-ROSAS,)	MOTION
)	
Petitioner.)	

Before the Court is Petitioner's 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed September 5, 2006 (Ct. Rec. 98, CR-04-0139-LRS, Ct. Rec. 1, CV-06-0253-LRS). The Motion is submitted by Celerino Sanchez-Rosas, who is appearing *pro se* for the purposes of these proceedings. Additionally, Mr. Celerino-Rosas has filed a Motion for Appointment of Counsel (Ct. Rec. 100).

I. BACKGROUND

Mr. Celerino-Rosas was indicted on July 8, 2004 for Conspiracy to Distribute 50 Grams or More of Actual Methamphetamine, specifically 56.1 grams in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §846; and Knowingly and Intentionally Distributed 50 Grams or More of Actual Methamphetamine, specifically 56.1 grams, in violation of 21 U.S.C. §841(a)(1). Mr. Celerino-Rosas pled guilty to Count Two

1 of the Indictment on March 16, 2005 with a written plea agreement. On
2 July 12, 2005, Mr. Celerino-Rosas was sentenced to a 120-month term of
3 imprisonment with five years supervised release; and a special
4 assessment of \$100. Mr. Celerino-Rosas filed a direct appeal of his
5 judgment and sentence on July 22, 2005. On July 26, 2005 Jeffry K.
6 Finer was appointed to represent Mr. Sanchez-Rosas. The United States
7 Court of Appeals for the Ninth Circuit affirmed the judgment of the
8 District Court on September 22, 2006. Mr. Celerino-Rosas contends
9 that his sentence is unconstitutional based on one ground:
10 ineffective assistance of counsel. Ct. Rec. 98, at 5.

11 II. DISCUSSION

12 28 U.S.C. § 2255 provides, in part:

13 A prisoner in custody under sentence of a court
14 established by Act of Congress claiming the right to
15 be released upon the ground that the sentence was
16 imposed in violation of the Constitution or laws of
17 the United States, or that the court was without
18 jurisdiction to impose such sentence, or that the
19 sentence was in excess of the maximum authorized by
20 law, or is otherwise subject to collateral attack, may
21 move the court which imposed the sentence to vacate,
22 set aside or correct the sentence.

19 A petitioner is entitled to an evidentiary hearing on the motion
20 to vacate his sentence under 28 U.S.C. § 2255, unless the motions and
21 the files and records of the case conclusively show that the prisoner
22 is entitled to no relief. This inquiry necessitates a twofold
23 analysis: (1) whether the petitioner's allegations specifically
24 delineate the factual basis of his claim; and, (2) even where the
25 allegations are specific, whether the records, files and affidavits
26 are conclusive against the petitioner. *United States v. Taylor*, 648

1 F.2d 565, 573 (9th Cir.), cert. denied, 454 U.S. 866 (1981) (internal
2 quotations, citations and footnote omitted).

3 This Court has carefully reviewed the record and, for the reasons
4 set forth more fully below, concludes Petitioner is not entitled to an
5 evidentiary hearing. A habeas corpus petitioner is entitled to an
6 evidentiary hearing in federal court if he alleges facts which, if
7 proven, would entitle him to habeas corpus relief. *Smith v.*
8 *Singletary*, 170 F.3d 1051, 1053-54 (11th Cir. 1999) (citation
9 omitted); *Cave v. Singletary*, 971 F.2d 1513, 1516 (11th Cir. 1992)
10 (citing *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770
11 (1963)). Here, the pertinent facts of the case are fully developed in
12 the record before the Court. *Smith*, 170 F.3d at 1054 (stating that a
13 district court does not need to conduct an evidentiary hearing "if it
14 can be conclusively determined from the record that the petitioner was
15 not denied effective assistance of counsel"). No evidentiary
16 proceedings are required in this Court. *High v. Head*, 209 F.3d 1257,
17 1263 (11th Cir.2000) (citing *McCleskey v. Zant*, 499 U.S. 467, 494, 111
18 S.Ct. 1454, 113 L.Ed.2d 517 (1991)), cert. denied, 532 U.S. 909, 121
19 S.Ct. 1237, 149 L.Ed.2d 145 (2001).

20 Further, the statute provides that only if the motion, file, and
21 records "conclusively show that the movant is entitled to no relief"
22 may the Court summarily dismiss the Motion without sending it to the
23 United States Attorney for response. 28 U.S.C. § 2255. The Rules
24 regarding § 2255 proceedings similarly state that the Court may
25 summarily order dismissal of a § 2255 motion without service upon the
26 United States Attorney only "if it plainly appears from the face of

1 the motion and any annexed exhibits and the prior proceedings in the
2 case that the movant is not entitled to relief in the district court."
3 Rule 4(a), RULES-SECTION 2255 PROCEEDINGS. Thus, when a movant fails to
4 state a claim upon which relief can be granted or when the motion is
5 incredible or patently frivolous, the district court may summarily
6 dismiss the motion. *Cf. United States v. Burrows*, 872 F.2d 915, 917
7 (9th Cir. 1989); *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir.
8 1985).

9 **A. MOTION FOR APPOINTMENT OF COUNSEL**

10 Generally, there is no constitutional right to counsel in a civil
11 case. *United States v. \$292,888.04*, 54 F.3d 564, 569 (9th Cir. 1995).
12 However, pursuant to 28 U.S.C. §1915(e)(1)(formerly 28 U.S.C.
13 §1915(d)), this court has discretion to request volunteer counsel for
14 indigent plaintiffs in exceptional circumstances. *Wilborn v.*
15 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). While this court may
16 request volunteer counsel in exceptional circumstances, it has no
17 power to make a mandatory appointment. *Mallard v. U.S. Dist. Court of*
18 *Iowa*, 490 U.S. 296, 301-08 (1989). Moreover, there are no funds
19 available to pay the services of such volunteer counsel.

20 In order to determine whether exceptional circumstances exist,
21 this court evaluates the plaintiff's likelihood of success on the
22 merits and the ability of the pro se plaintiff to articulate his or
23 her claim in light of the complexity of the legal issues involved.
24 *\$292,888.04*, 54 F.3d at 569. However, "[n]either of these factors is
25 dispositive and both must be viewed together before reaching a
26

1 decision on request of counsel under §1915(d)." *Wilborn*, 789 F.2d at
2 1331.

3 Although it does appear that plaintiff has no chance of
4 succeeding on the merits of his claims, it is clear from reviewing his
5 pleadings that he has no difficulty articulating his claims. And the
6 court finds that the legal issues are not so complex that plaintiff
7 cannot proceed *pro se*. While plaintiff is free to pursue efforts to
8 secure private counsel, the court has no duty to assist in such
9 efforts where no exceptional circumstances exist. *United States v.*
10 *30.64 Acres of Land*, 795 F.2d 796, 799, 804 (9th Cir.1986).

11 **B. GROUND ONE-INEFFECTIVE ASSISTANCE OF COUNSEL**

12 Mr. Celerino-Rosas alleges that his attorney Mr. George Paul
13 Trejo Jr., deprived him of his constitutional right to effective
14 assistance of counsel from the very beginning and through his plea and
15 sentencing. In support of his ineffective counsel claim, Mr.
16 Celerino-Rosas states:

17 1) Defense attorney could procure other alternatives instead of
18 induct [sic] his client to take plea;

19 2) defense attorney did not file a motion to withdraw plea after
20 safety valve disqualification;

21 3) defense attorney did not request for live witnesses who would
22 support to [sic] the petitioner.

23 Ct. Rec. 98, at 5.

24 Specifically, Mr. Sanchez-Rosas states that he was induced to
25 make his plea in ignorance of the safety valve rules. Petitioner
26 states that 21 U.S.C. §841(b)(1)(A)(VIII) was not applicable to him

1 and defense counsel was deficient by admitting that this statute was
2 applicable to him, permitting the mandatory sentence of the 5 years.¹
3 Mr. Sanchez-Rosas further asserts that defense counsel failed to file
4 adequate motions on his behalf from pre-plea investigation through
5 [sic] sentence. Ct. Rec. 99, at 19. Petitioner states that defense
6 attorney should have demanded a "Richardson" hearing, a "Frank's"
7 hearing and should have filed a motion for a Bill of Particulars, a
8 motion to dismiss, and a motion to preserve evidence. Id. at 20.
9 Mr. Sanchez-Rosas states that he "was inducted [sic] to give up his
10 rights to demand a speedy trial in exchange for worthless plea a
11 charge agreement." Id. at 21. Finally, Mr. Sanchez-Rosas states that
12 defense counsel "mayacted [sic] under conflict of interest." Id. at
13 22.

14 The Court rejects Mr. Sanchez-Rosas's argument, and concludes
15 that defense counsel's performance was not deficient. There is no
16 showing that counsel's efforts were not those of a reasonably
17 competent practitioner or that failure to seek a bill of particulars
18 deprived Sanchez-Rosas of the opportunity to litigate the issue. He
19 points to no deficient performance by trial counsel which prejudiced
20 his defense and deprived him of an opportunity to have a fair trial.
21 *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064,
22 80 L.Ed.2d 674 (1984). Likewise there is no evidence that the failure
23 of trial counsel to make such motions or demands for hearings impacted
24 Sanchez-Rosas's decision to plead guilty.

25
26 ¹Mr. Sanchez-Rosas received a mandatory 10 year sentence rather than
five years as stated in his argument.

1 In addressing the issue of ineffective assistance of counsel, the
2 Court is guided by the now-familiar construct of *Strickland v.*
3 *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which
4 the petitioner acknowledges is the relevant standard. As required by
5 that analytical framework:

6 First, the defendant must show that counsel's
7 performance was deficient. This requires showing that
8 counsel made errors so serious that counsel was not
9 functioning as the "counsel" guaranteed the defendant
10 by the Sixth Amendment. Second, the defendant must
11 show that the deficient performance prejudiced the
12 defense. This requires showing that counsel's errors
13 were so serious as to deprive the defendant of a fair
14 trial, a trial whose result is reliable.
15 Id. at 687.

16 Establishing these two elements is not easy: "the cases in which
17 habeas petitioners can properly prevail on the ground of ineffective
18 assistance of counsel are few and far between." *Waters v. Thomas*, 46
19 F.3d 1506, 1511 (11th Cir.1995) (*en banc*) (*quoting Rogers v. Zant*, 13
20 F.3d 384, 386 (11th Cir.1994)).

21 In *Groseclose v. Bell*, 130 F.3d 1161, 1167 (6th Cir.1997),
22 discussing the first prong of the *Strickland* analysis, the Sixth
23 Circuit recognized:

24 The [Supreme] Court cautioned that in undertaking an
25 ineffective-assistance review, "[j]udicial scrutiny of
26 counsel's performance must be highly deferential," and
must avoid the "second-guess[ing of] counsel's
assistance . . . , [as] it is all too easy for a court,
examining counsel's defense after it has proved
unsuccessful, to conclude that a particular act or
omission of counsel was unreasonable." *Strickland*, 466
U.S. at 689. In order to avoid "the distorting
effects of hindsight," a reviewing "court must indulge
a strong presumption that counsel's conduct falls
within the wide range of reasonable professional
assistance; that is, the defendant must overcome the
presumption that . . . the challenged action 'might be

1 considered sound trial strategy." ' *Id.* (citation
2 omitted).

3 Furthermore, in evaluating the prejudice suffered by a petitioner
4 as a result of alleged ineffective assistance of counsel, "[i]t is not
5 enough for the defendant to show that the errors had some conceivable
6 effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693.
7 Indeed, "[v]irtually every act or omission of counsel would meet that
8 test, and not every error that conceivably could have influenced the
9 outcome undermines the reliability of the result of the proceeding."
10 *Id.* (citation omitted). Rather, the petitioner "must show that there
11 is a reasonable probability that, but for counsel's unprofessional
12 errors, the result of the proceeding would have been different. A
13 reasonable probability is a probability sufficient to undermine
14 confidence in the outcome." *Id.* at 694.

15 Finally, in conducting this inquiry, we need not apply
16 *Strickland's* principles in a mechanical fashion. As the Supreme Court
17 explained:

18 [A] court need not determine whether counsel's
19 performance was deficient before examining the
20 prejudice suffered by the defendant as a result of the
21 alleged deficiencies. The object of an ineffectiveness
22 claim is not to grade counsel's performance. If it is
23 easier to dispose of an ineffectiveness claim on the
24 ground of lack of sufficient prejudice, which we
25 expect will often be so, that course should be
26 followed.
Id. at 697.

27 The Court begins its review by either determining whether
28 counsel's performance was deficient, or by determining any possible

1 prejudice suffered by Mr. Sanchez-Rosas. In either event, the result
2 in this case is identical.

3 According to Mr. Sanchez-Rosas, defense counsel explained the
4 plea agreement and he was satisfied with his assistance. Further, at
5 the change of plea hearing, Mr. Sanchez-Rosas indicated that Mr. Trejo
6 had read the plea agreement to him and he understood the agreement,
7 which undermines his claim that he was induced into accepting a
8 "worthless plea."

9 In fact, it appears that Mr. Sanchez-Rosas was fully satisfied
10 with the services from Mr. Trejo. At the change of plea hearing, the
11 following colloquy occurred:

12 THE COURT: Have you had the opportunity and have you, in fact, fully
discussed those charges with your attorney"

13 DEFENDANT: Yes, Your Honor.

14 THE COURT: Are you fully satisfied with the counsel, representation
and advice given to you in this case by your attorney, Mr.
Trejo?

15 DEFENDANT: Yes, Your Honor.

16 THE COURT: Is your willingness to plead guilty the result of
discussions that you or your attorney have had with the
attorney for the government?

17 DEFENDANT: Yes, Your Honor.

18 THE COURT: Was the plea agreement read and translated in the Spanish
language before you signed it?

19 DEFENDANT: Yes, Your Honor.

20 THE COURT: In this case the maximum penalty carries a mandatory
minimum sentence of 10 years in prison, a five year term
of supervised release and a one hundred dollar special
penalty assessment. Also where one is convicted of
21 distributing at least 50 grams of actual methamphetamine,
the penalty can be, and this is its maximum, life
22 imprisonment, a fine not to exceed 4 million dollars, a
term of supervised release that could last up to your
23 entire life, denial of certain federal benefits and a one
hundred dollar special penalty assessment, do you
24 understand?

25 DEFENDANT: Yes, Your Honor.

26 Reporter's Transcript, Ct. Rec. 85, at pp. 5-6, 8.

1 The record additionally contains no evidence that Mr. Sanchez-
2 Rosas's attorney breached his ethical duty or other duties in
3 representing the Petitioner. Mr. Sanchez-Rosas also had every
4 opportunity to speak directly to the Court as to matters that he
5 wanted taken into account in setting his sentence. Reporter's
6 Transcript, Ct. Re. 87, at 8.

7 Finally, given Mr. Sanchez-Rosas' criminal history, and
8 admissions after his arrest and at the change of plea hearing,² there
9 is no indication that Mr. Sanchez-Rosas was prejudiced, i.e., that he
10 would have received a lesser sentence than 120 months, the sentence he
11 received, and which was a statutory mandatory minimum. Even assuming
12 arguendo deficient performance by defense counsel, Petitioner has not
13 shown prejudice. Under the prejudice prong of the inquiry, Petitioner
14 "must affirmatively prove prejudice by showing that counsel's errors
15 actually had an adverse effect on the defense." *United States v.*
16 *Freixas*, 332 F.3d 1314, 1320 (11th Cir.2003). This showing requires
17 "more than some conceivable effect on the outcome of the proceeding."
18 *Id.* Here, Petitioner has not shown that a reasonable probability
19

20 ²THE COURT: The elements of your-of the charge against you are set
21 forth at page 4 of the plea agreement and involve three things. That you
22 knowingly and intentionally distributed a controlled substance.
23 Secondly, that the controlled substance contained actual methamphetamine.
And third, that the weight of the actual methamphetamine was more than
50 grams. Are all three of those elements present in your case?

24 DEFENDANT: Yes, Your Honor.

25 THE COURT: Starting at page 4, line 21 and continuing on to page 5
and 6, is a detailed factual statement which indicates
the facts upon which your plea is based. Are those facts
true and accurate to your knowledge?

26 DEFENDANT: Yes, Your Honor.

Reporter's Transcript, Ct. Rec. 85, at pp. 8-9.

1 exists that the outcome of the case would have been different if his
2 lawyers had given the assistance that Petitioner has alleged he should
3 have provided. This ineffectiveness claim is without merit. The Court
4 finds that the Petitioner has not provided any evidence to convince
5 this Court that his constitutional rights were violated.

6 The Petitioner is not entitled to an evidentiary hearing on the
7 motion to vacate his sentence under 28 U.S.C. § 2255. Additionally,
8 the Court summarily dismisses the Motion without sending it to the
9 United States Attorney for response. Accordingly,

10 **IT IS ORDERED** that:

11 1. Mr. Sanchez-Rosas's Motion to Vacate, Set Aside, or Correct
12 Sentence by a Person in Federal Custody, filed September 5, 2005 (**Ct.**
13 **Rec. 98**, CR-04-0139; **Ct. Rec. 1**, CV-06-0253) is **DENIED**.

14 2. Petitioner's Motion for Appointment of Counsel, **Ct. Rec. 100**,
15 filed September 5, 2006 is **DENIED**.

16 3. The District Court Executive is directed to:

17 (a) File this Order;

18 (b) Provide a copy to Petitioner **AND TO** the United States
19 Attorney, Spokane, Washington; and

20 (c) **CLOSE THESE FILES**.

21 **DATED** this 30th day of November, 2006.

22
23 *s/Lonny R. Suko*

24 _____
LONNY R. SUKO
UNITED STATES DISTRICT JUDGE